IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 8 .2.2008

CORAM:

THE HONOURABLE MR.JUSTICE ELIPE DHARMA RAO
AND
THE HONOURABLE MR.JUSTICE S.R.SINGHARAVELU

Writ Appeal No.1895 of 2004

A.Thangapandi ... Appellant

Vs.

1.M.Sivabalan

2.State of Tamil Nadu,
rep.by its Secretary,
Department of School Education,
Fort St.George,
Chennai-600009.

3.Director of School Education,
DPI Compound,
College Road,
Chennai-600006.

4.Chief Educational Officer,
Tallakulam,
Madurai-625002.

5.District Education Officer,
Tallakulam,
Madurai-625002.

6.Madurai Nadar Uravinmurai Jayaraj
Nadar Higher Secondary School,
Nagamalai,
rep.by its Secretary,
Nagamalai,
Madurai-625019. ... Respondents

* * *
Writ Appeal filed under Clause 15 of the Letters Patent, as against the order dated 13.2.2004 made in W.P.No.20464 of 2002 by the learned single Judge of this Court.
* * *
For appellant : Mr.R.Subramanian

For R.1 : Mr.M.Ramamoorthi
For R.2 to R.5 : Mr.P.Subramaniam, G.A.
For R.6 : No appearance

* * *
JUDGMENT

ELIPE DHARMA RAO, J.
The appellant herein was appointed as Physical Education Teacher in the 6th respondent School on 1.6.1994. The 6th respondent School is functioning as a Non-minority aided Educational institution, getting grants from the State under the provisions of the Tamil Nadu Grant-in-aid code of the Educational Department and the School is covered by the rules and regulations of Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 and the Tamil Nadu Recognised Private Schools (Regulation) Rules 1974.
2. It is seen from the records that one V.Chokkalai was working as Physical Director Grade-II and he retired on attaining the age of superannuation on the A.N. of 30.9.1999, but was re-employed from 1.10.1999 to 31.5.2000. In the meanwhile, pursuant to the repeated requests of the said V.Chokkalai and as per G.O.(4D) No.1, School Education Department, dated 21.1.2000, the Director of School Education had passed orders in his proceedings R.C.No.2431/W7/W12/97, dated 21.3.2000 upgrading the post of Physical Director Grade-II held by the said V.Chokkalai to that of Physical Director Grade-I, subject to the condition that the Teacher whose post has been upgraded should possess the requisite qualifications to the post of Physical Director Grade-I and the School should have a strength of not less than 400 pupils from Standards 9 to 12.

3. It is the case of the upgrading authority i.e. the educational authorities that at the time of upgrading the post, the incumbent viz. V.Chokkalai was working on re-employment terms from 1.10.1999 to 31.5.2000 and hence the upgradation of Physical Director Grade-II into Grade-I was not effected and not utilised since the incumbent retired on 30.9.1999 on attaining the age of superannuation and hence the post continued as Physical Director Grade-II, in which capacity alone the said Chokkalai retired. It is also seen that the Director of School Education, in his proceedings Rc.No.2431/W7/97-1, dated 20.4.2002 withdrew the order of upgradation for the reason that the said incumbent Mr.Chokkalai had already retired from service, after completing the re-employment period also.

4. This stand of the Government is challenged by the writ petitioner on the ground that whenever any upgradation is ordered, it is only the post, but not the stature of the concerned individual that gets upgraded. This contention of the writ petitioner/first respondent is strongly refuted by the official respondents on the ground that insofar as the Educational Department is concerned, the upgradation is always done only with reference to the qualifications of the person concerned who is holding the post of Grade-II so as to be upgraded to Grade-I and the pupil strength of the School concerned. There is force in the said argument advanced on the part of the official respondents. When the aid granting authorities, in the interest of the pupil, are following such strict principles in the matter of upgradation and when the cancellation of the upgradation of the post was not challenged, we have no hesitation to hold the stand of the official respondents as more pragmatic and in the best interest of the pupil and therefore, the contention of the writ petitioner contra has to fail.

5. Consequent to the retirement of the said Chokkalai, the Chief Educational Officer, Madurai, in his proceedings in M.M.No.5888/B5/2001, dated 5.7.2001 has permitted the 6th respondent School to fill up the post of Physical Education Director Grade-II during the academic year 2001-2001. But, even prior to grant of this permission, the School Committee, as per their resolution dated

26.6.2001, has called for a list of eligible candidates from the Employment Exchange to fill up the post of Physical Education Director Grade-I and has appointed the first respondent herein as Physical Education Director Grade-I in the School, subject to approval by the Chief Educational Officer.

6. At this juncture, it is relevant to quote Rule 15 (4) (ii) of the Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974, which reads as follows:
"(ii) Appointments to the various categories of teachers shall be made by the following methods:-
(i) Promotion from among the qualified teachers in that school.
(ii) If no qualified and suitable candidate is available by method (i) above, -
(a) Appointment of other persons employed in that school, provided they are fully qualified to hold the post of teachers.
(b) Appointment of teachers from any other school.
(c) Direct recruitment.
In the case of appointment from any other school or by direct recruitment, the School Committee shall obtain the prior permission of the District Educational Officer in respect of Pre-primary, Primary and Middle School and that of the Chief Educational Officer in respect of High Schools and Higher Secondary Schools, Teachers' Training Institutions setting out the reasons for such appointment. In respect of corporate body running more than one school, the schools under that body shall be treated as one unit for purpose of this rule."

7. A significant factor to be pointed out in this case is that there is no material on record to show that any such prior permission was obtained by the School Committee to fill up the vacancy created on the retirement of Mr.Chokkalai. Further more, as has been pointed out supra, since the upgradation granted was not utilised, Mr.Chokkalai retired only as Grade-II Physical Education Director and there was no sanction for the School Committee to fill up the post of Physical Education Director Grade-I. However, the School Committee, by virtue of their resolution, have addressed a letter to the concerned employment exchange to fill up the post of Physical Education Director Grade-I and from out of the said list, has appointed the writ petitioner as the Physical Education Director Grade-I. To fill up the post of Physical Education Director Grade-I, the 6th respondent School has quoted the proceedings of the Director of School Education in Na.Ka.No.101359/W7/2001, dated 6.12.2001, as if in the said proceedings, the School was permitted to fill up the post of Physical Education Director Grade-I. When the 6th respondent has addressed a letter to the Chief Educational Officer, Madurai-2, quoting the above said proceedings of the Director of School Education, dated 6.12.2001 and sought approval of the appointment of the first respondent, it was found to be a bogus communication, created to suit the convenience of the school and hence the Director of School Education, Chennai has addressed the Superintendent of Police, Madurai District to enquire into this aspect and it is submitted on the part of the learned Government Advocate that the reply in this regard is still awaited.

8. Though notice was served, the 6th respondent School has not chosen to contest this appeal. The contention of the official respondents that they have already informed the School by an order dated 8.11.2001 about the non-existence of the Physical Director Grade-I post was not under dispute. In spite of that, the 6th respondent School has appointed the first respondent, that too, without obtaining the prior permission of the authorities concerned, as required under Rule 15(4)(ii), extracted supra, and even while seeking for approval of the appointment of the first respondent, the Management had the audacity to quote a bogus proceeding, as if they were permitted by the higher authorities to fill up the post. Therefore, there is no hesitation for us to held that the first respondent/writ petitioner was appointed in a non-existent post that too resorting to forging the official documents, punishable under criminal laws of the land and hence, there is nothing wrong in the impugned proceeding of the official respondents, cancelling such appointment of the first

respondent/writ petitioner.

9. Private Schools are required to discharge their duties as per the Tamil Nadu Recognised Private Schools (Regulation) Act, 1972 and the Rules framed thereunder and there can be no doubt that the private schools are thus discharging public duties and are subject to the control of statutory authorities. Therefore, they are expected to maintain decorum and give strict compliance to the provisions of law. But, in the case on hand, the 6th respondent School has resorted to illegal methods with a malafide intention and created bogus documents, for which they need to be prosecuted. Therefore, the official respondents 2 to 4 are directed to launch criminal prosecution against the 6th respondent School, to which the Superintendent of Police, Madurai District, shall extend his full co-operation and see that the complaint lodged by the Director of School Education, Chennai in this regard to reach its logical ends, at the earliest.

10. As far as the first respondent/writ petitioner is concerned, by virtue of a bogus proceeding, he was appointed by the 6th respondent School without following the provisions of Rule 15(4)(ii), extracted supra, that too when the post is not in existence and therefore, his selection itself is illegal and hence, the first respondent/writ petitioner cannot claim anything from the official respondents and at the most he can claim damages against the 6th respondent School Management, by initiating proper proceedings before proper forum.

11. The learned counsel appearing for the first respondent argued that if at all the appointment of the first respondent/writ petitioner could be termed only as irregular and therefore, the same can very well be regularised. In support of his arguments, the learned counsel for the first respondent would rely on a judgment of the Division Bench of this Court in A.RUCKMANI vs. THE CORRESPONDENT, GANDHIJI AIDED MIDDLE SCHOOL, KEELASIVIRI AND OTHERS [(2003) 2 MLJ 4], wherein it has been held:
"What would be the relevant date would be a question in this appeal. The learned single Judge has taken a view that on the date when the post was filled up i.e. on 2.2.1994, it is an admitted position that the appellant did not have the necessary qualification of B.Ed., though she had appeared for the examination in the month of May, 1993, since the results of the examination were not declared till March, 1994. Under the circumstances, the contention of the learned counsel for the appellant cannot be accepted that the relevant date should have been the date on which the Joint Director decided the appeal, i.e. on 31.7.1995. The entitlement of the petitioner for being appointed in the post would always be with reference to the date on which the post fell vacant and when she staked the claim to that post."
12. The learned counsel for the first respondent would also rely on a judgment of the Honourable Apex Court in ASHOK KUMAR SONKAR vs. UNION OF INDIA AND OTHERS [(2007) 4 SCC 54], wherein it has been held:
"It is not a case where appointment was irregular. If an appointment is irregular, the same can be regularised. The court may not take serious note of an irregularity within the meaning of the provisions of the Act. But if an appointment is illegal, it is non est in the eye of law, which renders the appointment to be a nullity."
13. But, as has already been pointed out supra, the very base of the appointment of the first respondent/writ petitioner is illegal based on a forged document, not irregular as has been tried to be put on the part of the first respondent/writ petitioner. Therefore, the question of regularising the said appointment, as if it is only an irregular appointment, does not at all arise. Hence, the purport of the above judgments cannot at all be applicable to the case on hand.

14. It is also to be pointed out at this juncture that on 28.7.2005, in the absence of any representation for the appellant, a representation was made before the First Bench of this Court that this matter was covered by the above quoted Division Bench of this Court in (2003) 2 MLJ 4, based

on which the appeal was dismissed. Thereupon, an application in W.A.M.P.No.3385 of 2005 has been filed on the part of the appellant herein, praying to set aside the said order of dismissal on the ground that the matter is not covered by the said judgment. The said application was allowed on 20.9.20055 and hence, this matter is again on board. But, as has already been adverted to supra, since the very appointment of the first respondent is only based on a forged document, both the above judgments are not applicable to his case.

15. Coming to the claim of the appellant, when Mr.Chokkalai was retired on attaining the age of superannuation, he was promoted to the cadre of Physical Director Grade-II by the 6th respondent Management, but the same was cancelled by the proceeding in Na.Ka.No.209/2001-2002, dated 23.3.2002, on the ground that the School was granted the post of Physical Education Director Grade-I by the Director of School Education, Chennai in Na.Ka.No.101359/W7/2001, dated 6.12.2001. Since the said communication dated 6.12.2001, relied on by the Management, is found to be bogus and created for the purpose of accommodating the first respondent/writ petitioner, the Management cannot cling on the same to cancel the promotion of the appellant to the post of Physical Director Grade-II, which fell vacant due to the retirement of the erstwhile incumbent Mr.Chokkalai and there is no dispute regarding the suitability of the appellant to the said post.

16. The said action of the Management depriving the due to the in-service candidate, in the case on hand the appellant, as mandated under Rule 15(4)(ii) more so after promoting him and cancelling the same is illegal. The action of the Management is patently illegal in depriving the benefits to the in-service candidate whose eligibility to the post is not under dispute and thus putforthing mental and physical harassment to the appellant further waste of time and therefore they are liable for prosecution and for damages. Therefore, the communication of the 6th respondent dated 23.3.2002, cancelling the promotion order of the appellant, is liable to be set aside.
17. A complete reading of the order passed by the learned single Judge would show that the fact of the first respondent/writ petitioner getting appointed based on a bogus proceeding was not brought to the notice of the learned single Judge, which lead the learned single Judge to land in an erroneous conclusion of allowing the claim of the first respondent/writ petitioner on a misplaced sympathy. Therefore, the order of the learned single Judge is liable to be set aside.
In the result, this writ appeal is allowed, setting aside the order of the learned single Judge. The 6th respondent is directed to restore the promotion of Physical Director Grade-II to the appellant within six weeks from the date of receipt of a copy of this order. No costs. Connected Miscellaneous petitions are closed.

Rao

To

1.The Secretary,
Government of Tamil Nadu,
Department of School Education,
Fort St.George,
Chennai-600009.

2.Director of School Education,
DPI Compound,
College Road,
Chennai-600006.

3.Chief Educational Officer,
Tallakulam,
Madurai-625002.

4.District Education Officer,
Tallakulam,
Madurai-625002.

5.The Superintendent of Police,
Madurai District,
Madurai.